RECORD AND BRIEFS

15-1359

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

IBRAHIM TURKMEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General and Director of the Federal Bureau of Investigation (FBI) personally liable for policy decisions made about national-security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether the former Attorney General and FBI Director are entitled to qualified immunity for their alleged role in the treatment of respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether respondents' allegations that the Attorney General and FBI Director personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanation—identified by the Court in *Iqbal*—that their actions were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to leave the United States.

PARTIES TO THE PROCEEDING

Petitioners John D. Ashcroft (former Attorney General of the United States) and Robert Mueller (former Director of the Federal Bureau of Investigation) were defendants in the district court and cross-appellees in the court of appeals.

The other parties to the proceeding include the following:

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya, on behalf of a putative class, who were plaintiffs in the district court and appellees-cross-appellants in the court of appeals;

Dennis Hasty (former Warden of the Metropolitan Detention Center), Michael Zenk (former Warden of the Metropolitan Detention Center), and James Sherman (former Metropolitan Detention Center Associate Warden for Custody), who were defendants in the district court and appellants-cross-appellees in the court of appeals; and

James W. Ziglar (former Commissioner of the Immigration and Naturalization Service), who was a defendant in the district court and a cross-appellee in the court of appeals.*

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* Two other individuals (Salvatore Lopresti, former Metropolitan Detention Center Captain, and Joseph Cuciti, former Metropolitan Detention Center Lieutenant) were defendants in the district court but did not appear in the court of appeals. See App. 3a n.2.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, former Director of the Federal Bureau of Investigation (FBI), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-163a) is reported at 789 F.3d 218. The opinions of members of the court of appeals concurring in and dissenting from the denial of rehearing en banc (App. 237a-250a) are reported at 808 F.3d 197. The opinion of the district court (App. 164a-236a) is reported at 915 F. Supp. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2015. Petitions for rehearing were denied on December 11, 2015 (App. 237a-238a). On February 29, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 11, 2016. On April 1, 2016, Justice Ginsburg further extended the time to May 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Like *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this case involves civil claims against high-ranking federal officials brought by aliens who were arrested for immigration violations by federal officials after the September 11, 2001 terrorist attacks and were detained at the Metropolitan Detention Center (MDC) in Brooklyn. Petitioners are the former Attorney General of the United States and the former FBI Director. As relevant here, six of the respondents claim, on behalf of themselves and a putative class, that the highly restrictive conditions of their detention violated their substantive-due-process and equal-protection rights under the Fifth Amendment. App. 301a-332a, 342a-343a (Fourth Am. Compl. ¶¶ 141-244, 276-283) (Compl.).[1]

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[1] Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Bajracharya were detained in restrictive conditions at the MDC. App. 253a-254a (Compl. ¶ 4). The other two plaintiffs—Ibrahim Turkmen and Akhil Sachdeva—were detained with the general population at the Passaic County Jail in New Jersey. App. 253a (Compl. ¶ 4). Because the court of appeals affirmed the dismissal of the claims brought by the Passaic plaintiffs (App. 75a, 84a, 86a), this petition uses "respondents" to refer to the six MDC detainees, to the exclusion

Respondents contend that petitioners, along with other Department of Justice officials, are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and liable as co-conspirators under 42 U.S.C. 1985(3). See App. 255a-256a (Compl. ¶ 9). Respondents seek compensatory and punitive damages, as well as attorney's fees and costs, from those officials in their individual capacities. App. 348a (prayer for relief).

As the Court discussed in *Iqbal*, the Department of Justice conducted a massive investigation to identify the perpetrators of the September 11 attacks and prevent any follow-on attacks. 556 U.S. at 667. "The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor" and, in the first week, "'received more than 96,000 tips or potential leads from the public.'" *Ibid.* (quoting Office of the Inspector Gen., Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 12 (Apr. 2003) (*OIG Report*)).[2] During the investigation, federal officials arrested and detained 762 aliens on charges that they had violated federal immigration laws. *Ibid.*

Aliens deemed to be "of interest" to the investigation were subjected to an unwritten "hold until cleared" policy, under which they would not be released until the FBI had cleared them of any connections to terrorism. *OIG Report* 37-40. A total of 84 detainees were housed at the MDC for varying periods

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of the Passaic plaintiffs and the other defendants identified in the Parties to the Proceeding section (see p. II, *supra*).

[2] The *OIG Report* is available at https://oig.justice.gov/special/0306/full.pdf.

between September 14, 2001 and August 27, 2002. *Id.* at 111. When they arrived, they were placed in the Administrative Maximum Special Housing Unit (ADMAX SHU), where they were subjected to the most restrictive conditions of confinement authorized by Bureau of Prisons policy. *Id.* at 112; *Iqbal*, 556 U.S. at 667-668.

2. Respondents were among those detained in the ADMAX SHU for periods ranging from three to eight months. App. 2a, 253a-254a (Compl. ¶ 4).[3] In light of their immigration status, it was undisputedly lawful to arrest and detain them pending their removal from the United States. App. 2a & n.1; see *Iqbal*, 556 U.S. at 682; *Turkmen* v. *Ashcroft*, 589 F.3d 542, 549-550 (2d Cir. 2009). But respondents claim that the restrictive conditions of their confinement violated their substantive-due-process rights because the government allegedly lacked any individualized information indicating that they were dangerous or involved in terrorism; and respondents further claim that the conditions violated their equal-protection rights because they were allegedly singled out for such treatment on account of being (or being perceived as) Muslim and either Arab or South Asian. App. 254a (Compl. ¶ 4), 265a-267a (¶¶ 39-44), 342a-343a (¶¶ 276-283).

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[3] Respondents were not among the plaintiffs when this suit was initially filed in 2002. App. 3a-4a, 180a. After this Court's decision in *Iqbal*, an earlier appeal in this case was remanded to the district court. See *Turkmen* v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009). All of the original plaintiffs except the two who were detained at Passaic settled their claims. *Id.* at 545-546; App. 3a-4a, 180a-183a. The district court granted leave to amend the complaint in August 2010, App. 183a, and the Fourth Amended Complaint added the six respondents as members of a putative class of persons who were detained at the MDC, App. 251a-349a; see note 1, *supra*.

Respondents' Fifth Amendment claims are brought against two groups of defendants: (1) the "DOJ Defendants" (former Attorney General Ashcroft, former FBI Director Mueller, and a former Commissioner of the Immigration and Naturalization Service (INS)), and (2) the "MDC Defendants" (for current purposes, two former wardens and a former associate warden of the MDC). App. 3a n.2, 258a-261a (Compl. ¶¶ 21-28), 342a-343a (¶¶ 276-283).[4] The equal-protection portion of those claims is echoed in a separate claim that the DOJ Defendants and the MDC Defendants conspired with each other to deprive respondents of the equal protection of the laws, in violation of 42 U.S.C. 1985(3). App. 347a (Compl. ¶¶ 303-306).

3. The defendants moved to dismiss the complaint, arguing that the judicially inferred remedy under *Bivens* should not extend to some of the claims, that defendants are entitled to qualified-immunity, and that plaintiffs have failed to state a claim. App. 5a. The district court granted those motions in part and denied them in part. App. 164a-236a. As relevant here, the court dismissed the claims against the DOJ Defendants (including Ashcroft and Mueller) in their entirety, finding that respondents have not adequately alleged that those defendants were personally involved in (or were even aware of) the creation of conditions of confinement so restrictive as to constitute a substantive-

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[4] In claims not at issue here, respondents also allege First and Fifth Amendment violations (on the basis of restrictions on their communications with family or counsel or their ability to practice and observe their religion) as well as Fourth and Fifth Amendment violations (on the basis of allegations that they were subjected to excessive, unreasonable, and deliberately humiliating strip searches). App. 343a-347a (Compl. ¶¶ 284-302).

due-process violation (App. 196a-199a) and that respondents' equal-protection claim fails in light of *Iqbal*, because their allegations "do not plausibly suggest that the DOJ Defendants purposefully directed the detention of [respondents] in harsh conditions of confinement due to their race, religion or national origin" (App. 209a). The court declined to accept respondents' suggestion that it could infer any punitive intent "from the DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully*." App. 198a.

The district court denied the motion to dismiss with respect to several of the claims against the MDC Defendants, finding sufficient allegations of their personal involvement in restrictive conditions or abusive conduct and finding that they are not entitled to qualified immunity. App. 199a-203a, 209a-211a. In the course of doing so, the court rejected the argument (made by both the DOJ and MDC Defendants) that it should decline to extend the *Bivens* remedy to the substantive-due-process claim, observing that "conditions-of-confinement claims do not present a new context" for the application of *Bivens*. App. 193a n.10.

4. The MDC Defendants appealed, and respondents cross-appealed the dismissal of the claims against the DOJ Defendants. App. 19a-20a. In an opinion written by Judges Pooler and Wesley, the panel majority ruled for respondents on most issues. App. 1a-86a.[5]

a. The court of appeals first held that "a *Bivens* remedy is available for [respondents'] punitive conditions of confinement * * * claims against both the DOJ and the MDC Defendants." App. 22a. The court

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[5] The following discussion focuses on the resolution of the claims against petitioners.

acknowledged that "the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Ibid.* (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)). It concluded, however, that the claims in this case do not present a new "context" and therefore do not require any extension of *Bivens*. App. 24a-29a & n.17. In the court's view, respondents' substantive-due-process and equal-protection claims "stand[] firmly within a familiar *Bivens* context" because some cases have entertained *Bivens* claims for the same allegedly injured rights and other cases have, in the context of different constitutional rights, entertained *Bivens* claims premised on the same "mechanism of injury (punitive conditions without sufficient cause)." App. 24a-25a.

b. The court of appeals next held that respondents have adequately alleged a substantive-due-process claim of restrictive confinement against the DOJ Defendants. App. 30a-49a. The court recognized that the September 11 detainees were lawfully arrested, that they could be lawfully detained, and that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on anyone for whom the government had "individualized suspicion of terrorism." App. 31a. There was thus no constitutional objection to the confinement at the ADMAX SHU of detainees on "the national INS List," for whom the government had "a suspicion that they were connected to terrorist activities." App. 32a. At some point in October 2001, however, it became evident that some of the detainees on the so-called "New York List" had been arrested during the course of the September 11 investigation but placed on that list without any addi-

tional determination having been made that there was evidence tying them to terrorism. App. 37a-38a.

The court of appeals rejected respondents' theory that Ashcroft's original policies for the September 11 investigation had been intended to create such results. App. 31a. Nevertheless, it constructed a different rationale: The court believed it plausible that petitioners had violated respondents' substantive-due-process rights by deciding (or approving of the decision) to merge the New York List with the national INS List and to continue to subject all detainees to the hold-until-cleared policy. App. 32a-33a. As a result of that decision, "some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement," even though there had not already been an express determination that they were suspected of having any terrorism connections. App. 39a. The court found that, in the absence of such an individualized determination, "it would be unreasonable * * * to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." App. 43a. The court inferred that continued detention in such circumstances was "punitive" and therefore a substantive-due-process violation under *Bell* v. *Wolfish*, 441 U.S. 520 (1979). App. 44a-48a.

In addressing the DOJ Defendants' qualified-immunity argument, the court of appeals concluded that the constitutional violation was clearly established, because any "condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees" and "because a pretrial detainee's right to be free from punishment

does not vary with the surrounding circumstances." App. 48a, 49a.

c. The court of appeals also held that respondents have adequately alleged an equal-protection claim against the DOJ Defendants. App. 61a-68a. Again, the court relied on the lists-merger theory, finding it "reasonable to infer that [the DOJ Defendants] possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner" and, further, that they "condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement." App. 64a.

For qualified-immunity purposes, the court of appeals found it "clearly established at the time of [respondents'] detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." App. 74a.

d. The court of appeals also held that respondents have "plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim." App. 81a. It found that there was a "tacit agreement" between the DOJ Defendants and two of the MDC Defendants "to effectuate the harsh conditions of confinement with discriminatory intent." *Ibid.* It also found that, even though there had been uncertainty in 2001 about whether the statute applied to federal officials, the defendants could not claim qualified immunity because "federal officials could not reasonably have believed

that it was legally impermissible for them to conspire * * * to deprive a person of equal protection of the laws." App. 83a (citation omitted).

e. Judge Raggi concurred in part with the judgment and dissented at length. App. 86a-163a. She pointed out that the decision had made the Second Circuit the first court of appeals "to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials * * * for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001." App. 86a-87a. She disagreed with the majority's failure to affirm the dismissal of the claims against petitioners on multiple grounds. First, she concluded that the *Bivens* remedy should not be extended to the novel context of this case, which involves a challenge to policy decisions that implicate the Executive's immigration authority and national-security authority, when Congress has been informed of concerns about treatment of the September 11 detainees and failed to provide any damages remedy. App. 90a-118a. Second, she concluded that petitioners are entitled to qualified immunity because it was not clearly established that petitioners' conduct (even under the majority's theory) violated respondents' constitutional rights. App. 137a-145a, 155a-158a. And third, she concluded that respondents are also entitled to qualified immunity because there are insufficient allegations of their personal involvement in any substantive-due-process or equal-protection violations. App. 122a-137a, 148a-155a.[6]

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[6] Judge Raggi would also have dismissed the Section 1985(3) conspiracy claim for the same reasons as the equal-protection claim. App. 158a n.46.

5. Petitioners sought rehearing en banc, as did the other defendants. Because the 12 participating members of the court of appeals split evenly, rehearing was denied. App. 238a.

Judges Pooler and Wesley, the authors of the panel majority opinion, filed a short opinion concurring in the denial. App. 238a-240a. They reaffirmed their view that respondents have "plausibly" pleaded that "the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy" by "endors[ing] the restrictive detention of a number of men who were Arabs or Muslims or both." App. 239a. They concluded that, after 13 years of appellate litigation, "it is time to move the case forward." App. 240a.

Six judges—Judges Jacobs, Cabranes, Raggi, Hall, Livingston, and Droney—filed a joint dissent from the denial of rehearing en banc. App. 240a-250a. They expressly incorporated Judge Raggi's dissent from the panel's decision. App. 241a. But they further explained that "[t]he panel decision raises questions of exceptional importance meriting further review." *Ibid.* The dissenters concluded that the panel's decision did not comport with this Court's precedents in three areas of the law: "(1) the narrow scope of *Bivens* actions, (2) the broad shield of qualified immunity, and (3) the pleading standard for plausible claims." *Ibid.* With respect to the first area, the dissenters also noted that the decision was "at odds" with those of four sister circuits, which had already "declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks." App. 242a-243a (citing cases). Although the dissenters' "focus" was on the panel's decision "to allow [respondents] to pursue damages against the Attorney General

and FBI Director," they endorsed Judge Raggi's explanation that the "claims against other officials should also be dismissed." App. 249a-250a n.16.

REASONS FOR GRANTING THE PETITION

Based on conclusory allegations and after-the-fact inferences drawn in the chambers of appellate judges, the court of appeals concluded that the Nation's highest-ranking law-enforcement officers—a former Attorney General of the United States and former Director of the FBI—may be subjected to the demands of litigation and potential liability for compensatory and even punitive damages in their individual capacities because they could conceivably have learned about and condoned the allegedly improper ways in which their undisputedly constitutional policies were being implemented by lower-level officials during an unprecedented national-security crisis. Moreover, the court reached that troubling result without even considering whether "special factors counsel[] hesitation" before applying the judicially inferred remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971), in the context of this case, which challenges high-level policy decisions implicating both national security and immigration.

Six members of the court of appeals correctly concluded that the panel's decision "raises questions of exceptional importance meriting further review," that it departs from this Court's precedents in three separate areas of the law, and that it puts the Second Circuit "at odds" with several other circuits. App. 241a, 242a-243a, 249a (joint dissent from denial of rehearing en banc). As it did in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), the Court should grant a writ of certiorari to correct those serious errors.

A. Special Factors Counsel Against Extending The Judicially Inferred *Bivens* Remedy To This Challenge To High-Level Executive Policymaking At The Confluence Of National Security And Immigration

This Court has "consistently and repeatedly recognized" the need for "caution toward extending *Bivens* remedies into any new context." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). Yet, by adopting a novel, blinkered approach, the decision below disregarded multiple factors that should have prevented it from extending *Bivens* to respondents' constitutional claims against the Attorney General and FBI Director. The court of appeals' method of analysis departs sharply from that used in other circuits, and the Second Circuit is the first circuit to permit such a damages remedy to be pursued "against executive branch officials for national security actions taken after the 9/11 attacks." App. 242a-243a (joint dissent from denial of rehearing en banc) (citing cases from the Fourth, Seventh, Ninth, and D.C. Circuits declining to recognize an extension of *Bivens* to such claims). Review by this Court is necessary to eliminate the Second Circuit's outlier status.[7]

1. In *Bivens*, this Court "recognized for the first time an implied private action for damages against

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[7] As Judges Pooler and Wesley noted, petitioners opposed the extension of *Bivens* in the district court but did not repeat that argument as an alternative ground of affirmance before the court of appeals panel. App. 21a. Petitioners did, however, include the issue in their petition for rehearing (at 11-13). And, because the issue was expressly passed upon by the court of appeals, App. 21a-29a, review would require no departure from this Court's "traditional rule," which "permit[s] review of an issue not pressed so long as it has been passed upon," *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 556 U.S. at 675 (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search and arrest. *Bivens*, 403 U.S. at 389. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has since "retreated" because they reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Malesko*, 534 U.S. at 67 & n.3 (citation omitted). Because such "implied causes of action" are now "disfavored," the Court has emphasized its "reluctan[ce] to extend *Bivens* liability to any new context or new category of defendants." *Iqbal*, 556 U.S. at 675 (citation and internal quotation marks omitted). For more than 35 years, the Court "ha[s] consistently refused to extend *Bivens* liability." *Malesko*, 534 U.S. at 68; see *Minneci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases). Thus, even when there is no indication from Congress that the Judiciary should "stay its *Bivens* hand," courts still must "'pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

2. The decision below erroneously concluded that this case "stands firmly within a familiar *Bivens* context." App. 25a. In reaching that result, the court of

appeals drained the term *context* of all meaning. It characterized respondents' claims at a high level of abstraction: "federal detainee [p]laintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions." App. 24a. The court then considered only whether two aspects of the abstract claim—"the rights injured" and "the mechanism of injury"—have any antecedents in prior *Bivens* cases. App. 24a-25a. In its view, the alleged "rights injured" were "substantive due process and equal protection rights," and the alleged "mechanism of injury" was "punitive conditions [of confinement] without sufficient cause." *Ibid.* The court believed that prior cases supported each half of that comparison, preventing the case from presenting "a new context" and obviating any need to hesitate before allowing the damages action to proceed. App. 24a-25a & n.15, 29a n.17.

a. On its own terms, that analysis is unpersuasive. As Judge Raggi's dissent pointed out, the court of appeals identified no established *Bivens* cases that shared both of the majority's selected attributes, and the panel majority was therefore forced to "mix and match a 'right' from one *Bivens* case with a 'mechanism of injury' from another." App. 95a. Moreover, the court's framework cannot even be reconciled with the few prior cases the court invoked. For instance, the court acknowledged that this Court recognized a *Bivens* action to redress an equal-protection claim about employment discrimination in *Davis* v. *Passman*, 442 U.S. 228 (1979), but then "declined to extend *Davis* to other employment discrimination" arising in the military context in *Chappell* v. *Wallace*, 462 U.S. 296 (1983). App. 24a n.15. The court of appeals attributed that difference to "the special nature of the

employer-employee relationship in the military—or, in other words, the mechanism of injury." *Ibid.* Yet, respondents, who were detained on the basis of immigration violations during a national-security investigation, are even less like civilian federal employees who could have brought equal-protection claims under *Davis* than are members of the military (who may not bring equal-protection claims under *Chappell*). In other words, even if the alleged "mechanism of injury" were the proper focus of the *Bivens*-context inquiry, *Davis* and *Chappell* counsel strongly *against* the application of *Bivens* here.

b. More fundamentally, the court of appeals erred in failing to take account of several factors that make the context of this case a novel one for *Bivens* purposes. By defining the "mechanism of injury" in relevant part as "punitive conditions [of confinement] without sufficient cause" (App. 24a-25a) while refusing to take account of any of the surrounding circumstances, the decision below takes an unduly categorical approach, and therefore opens the door to potential *Bivens* liability in a range of sensitive contexts where other courts have declined to entertain *Bivens* claims that individual federal officers subjected federal detainees housed in federal facilities to cruel treatment.[8]

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[8] See *Vance* v. *Rumsfeld*, 701 F.3d 193, 198-203 (7th Cir. 2012) (en banc) (declining to recognize *Bivens* claim for alleged mistreatment or abuse of detainees by military personnel and civilian superiors), cert. denied, 133 S. Ct. 2796 (2013); *Doe* v. *Rumsfeld*, 683 F.3d 390, 393-397 (D.C. Cir. 2012) (declining to recognize *Bivens* claim arising from alleged mistreatment of military detainee); *Lebron* v. *Rumsfeld*, 670 F.3d 540, 552-556 (4th Cir.) (declining to recognize *Bivens* claim arising from designation and alleged mistreatment of enemy combatant), cert. denied, 132 S. Ct. 2751 (2012); *Ali* v. *Rumsfeld*, 649 F.3d 762, 773-774 (D.C. Cir. 2011)

Respondents' claims against Ashcroft and Mueller are far from the "familiar *Bivens* context." App. 25a. Respondents seek to challenge high-level policy decisions and to do so in a context that implicates both national security and immigration. Each of those considerations has been identified by other circuits as a reason to hesitate before extending *Bivens*.

The heart of respondents' complaint attacks what they characterize as fundamental "policy" decisions made by the Attorney General in the course of the September 11 investigation: an alleged "policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism" and "a blanket 'hold-until-cleared' policy," under which out-of-status aliens identified as being of interest to the investigation would not be released until the FBI had "affirmatively cleared them of terrorist ties." App. 252a-253a, 265a (Compl. ¶¶ 2, 39). This Court, however, has "never considered" the *Bivens* remedy to be "a proper vehicle for altering an entity's policy." *Malesko*, 534 U.S. at 74. *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers," not "deterring the conduct of a policymaking entity." *Id.* at 71; see also *ibid.* ("*Bivens* from its inception has been based * * * on the deterrence of individual officers who commit unconstitutional acts"); *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994).

The Attorney General and FBI Director are, to be sure, individual federal employees who are bound to follow the Constitution. But their high-level policy

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(declining to recognize *Bivens* claim arising from alleged torture of military detainee); *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.) (declining to recognize *Bivens* claim arising from alleged mistreatment of military detainees), cert. denied, 558 U.S. 1091 (2009).

decisions are materially different from the unauthorized actions of rogue officers that *Bivens* typically serves to deter. Most saliently, such policy decisions are more likely to receive scrutiny from non-judicial sources, such as the Inspector General and Congress. Indeed, that is what happened here. See *OIG Report* 37-71, 111-164 (addressing hold-until-cleared policy and conditions of confinement at the MDC); App. 114a-118a (Raggi, J., dissenting in relevant part) (discussing Congress's awareness of those policies, its consideration of possible remedies, and its failure to enact any damages remedy). Thus, before this case, the Second Circuit itself, sitting en banc to consider another *Bivens* claim against former Attorney General Ashcroft, distinguished between "policies promulgated and pursued by the executive branch" and "isolated actions of individual federal employees." *Arar* v. *Ashcroft*, 585 F.3d 559, 578 (2009), cert. denied, 560 U.S. 978 (2010). And the Seventh Circuit observed—in rejecting a *Bivens* claim against another Cabinet officer—that "the normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author." *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

The nature of the policy decisions in this case also serves to define the context of respondents' claims. Those policies implicate both national security and immigration—two areas that have been independently recognized as ones into which courts should generally be reluctant to intrude on their own initiative. App. 106a-114a (Raggi, J., dissenting in relevant part); see generally *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (national security); *Harisiades* v. *Shaughnessy*, 342 U.S.

580, 588-589 (1952) (immigration). When presented with *Bivens* claims, other courts of appeals have repeatedly recognized that, when a constitutional claim implicates either national security or immigration, that consideration both alters the relevant context of the claim and counsels against an extension of *Bivens*. See, *e.g.*, *Alvarez* v. *ICE*, No. 14-14611, 2016 WL 1161445, at *11-*16 (11th Cir. Mar. 24, 2016) (immigration); *Meshal* v. *Higgenbotham*, 804 F.3d 417, 423-425 (D.C. Cir. 2015) (national security); *De La Paz* v. *Coy*, 786 F.3d 367, 371-380 (5th Cir. 2015) (immigration), petition for cert. pending, No. 15-888 (filed Jan. 12, 2016); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2012) (same), cert. denied, 133 S. Ct. 2336 (2013); *Lebron* v. *Rumsfeld*, 670 F.3d 540, 552-556 (4th Cir.) (national security), cert. denied, 132 S. Ct. 2751 (2012); *Ali* v. *Rumsfeld*, 649 F.3d 762, 773-774 (D.C. Cir. 2011) (same). The decision below erred in failing to recognize the novel context of respondents' claims and therefore in failing even to consider what the next step in the analysis would have shown: that the multiple special factors presented here, when taken in combination, counsel decisively against allowing respondents' *Bivens* claims against the former Attorney General and FBI Director.

3. No other court of appeals has adopted a mode of analysis that—like the decision below—would disregard altogether the fact that a claim arises in the context of immigration or national security. To be sure, the precise combination of factors that makes the *Bivens* remedy inappropriate here has not arisen in other circuits, but the dissenting judges are surely correct that the decision here is "at odds" with those of

other circuits. App. 243a.[9] No other court of appeals would simply pretend that this unprecedented case "stands firmly within a familiar *Bivens* context." App. 25a. And no other court of appeals has "extend[ed] *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks." App. 242a-243a (joint dissent from denial of rehearing en banc) (citing cases from Fourth, Seventh, Ninth, and D.C. Circuits declining to extend *Bivens*).

As relevant here, respondents' *Bivens* claims challenge the exercise by the Attorney General and the FBI Director of the Executive's constitutional authority to protect national security, to investigate a violent attack against the Nation on our own soil, and to enforce the immigration laws. Deterring national officeholders from "full use of their legal authority" in such contexts has "consequences" that "counsel caution by the Judicial Branch." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 747 (2011) (Kennedy, J., concurring). The court of appeals' casual extension of *Bivens* to this novel context warrants immediate review.

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[9] In *Alvarez*, the Eleventh Circuit expressly sought to distinguish this case. See 2016 WL 1161445, at *12 n.6. In *Meshal*, the D.C. Circuit declined to decide whether the national-security context of a terrorism investigation would be sufficient, in the domestic context, to preclude a *Bivens* remedy. See 804 F.3d at 425. In *De La Paz*, three judges dissenting from denial of rehearing en banc characterized the Fifth Circuit's decision as being "in conflict" with the Second Circuit's decision in this case, but they referred to its discussion of *Fourth* Amendment claims against the MDC Defendants (App. 28a-29a) not of the *Fifth* Amendment claims against Ashcroft and Mueller. See *De La Paz* v. *Coy*, 804 F.3d 1200, 1202 (2015) (Prado, J., dissenting from denial of rehearing en banc, joined by Dennis and Graves, JJ.).

B. It Was Not Clearly Established That Aliens Legitimately Arrested During The September 11 Investigation Could Not Be Subjected To Restrictive Conditions Of Confinement Until They Were Cleared Of Any Connections With Terrorism

Even assuming arguendo that respondents have plausibly alleged that Ashcroft and Mueller personally condoned or endorsed a decision to merge two lists of September 11 detainees (but see pp. 27-31, *infra*), they would still be entitled to qualified immunity because, at the time, it was not clearly established that continued confinement in restrictive conditions under the hold-until-cleared policy would be seen as unjustified and therefore attributable only to either punitive or discriminatory intentions. In concluding otherwise, the court of appeals defined the relevant legal question at too high a level of generality, committing a mistake that this Court has often had to correct to ensure that qualified immunity continues to serve its vital purpose of protecting "all but the plainly incompetent or those who knowingly violate the law." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted).

1. For three decades, this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742); see also, *e.g.*, *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 n.5 (2012); *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). Instead, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful

in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

2. The court of appeals flouted that long-standing instruction.

a. With respect to respondents' substantive-due-process claim, there is no dispute that the September 11 detainees were lawfully arrested, that they could be lawfully detained, and that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on anyone for whom the government had "individualized suspicion of terrorism." App. 31a. Under the court of appeals' lists-merger theory, however, detainees on the New York List were deemed the equivalent of "ordinary civil detainees," because it was eventually discovered that some of them had been arrested and detained without any separate determination that there was evidence linking them to terrorism. App. 39a, 43a. Thus, when the court addressed qualified immunity, it simply said that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees" and that "a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances." App. 48a, 49a.

Those general formulations, however, failed to account for the actual circumstances that confronted Ashcroft and Mueller when they allegedly condoned the merger of the two lists of detainees. The relevant question is not whether "ordinary civil detainees" or "pretrial detainee[s]" (App. 43a, 49a) could be held in the restrictive conditions at the ADMAX SHU for no reason. Instead, the correct question is whether all aliens on the New York List (each of whom had been

legally arrested and detained in conjunction with the September 11 investigation) had a clearly established right to be immediately released from restrictive conditions of confinement merely because it came to light that, in some instances, arresting officers had failed to conduct the same initial vetting that detainees on the national INS List had received.

The court of appeals identified no cases indicating, much less establishing, that the Constitution prevented officials in such circumstances from reacting to that unexpected development by "err[ing] on the side of caution," preserving the status quo, and continuing to subject *all* the detainees to the hold-until-cleared policy in order to ensure "that a terrorist would not be released by mistake." *OIG Report* 56. That cautious approach was not manifestly unreasonable or plainly unrelated to any "legitimate governmental objective." App. 48a. As Judge Raggi's dissent explained, even "in the absence of individualized suspicion of terrorist connections," it was not "arbitrary or purposeless to national security to hold such illegal aliens in restrictive * * * confinement pending clearance." App. 141a.[10]

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[10] Nor was it clearly established in 2001 that the Constitution forbade "restrictive confinement of lawfully detained persons" on the basis of "general, rather than individualized, suspicion of dangerousness." App. 247a (joint dissent from denial of rehearing en banc); see App. 139a-140a (Raggi, J., dissenting in relevant part) (discussing *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012) (intake strip searches of all arrestees); *Whitley* v. *Albers*, 475 U.S. 312, 316 (1986) (shooting policy during prison riot); *Block* v. *Rutherford*, 468 U.S. 576, 585-587 (1984) (blanket prohibition on contact visits); *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979) (body-cavity searches of pre-trial detainees after contact visits)).

The court of appeals' decision is contrary to this Court's repeated admonitions that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743; see also *ibid.* (explaining that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") (citation omitted). As Judge Raggi observed, it is impossible to "conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy." App. 120a. Indeed, the 6-6 vote in the court of appeals bolsters petitioners' entitlement to qualified immunity,[11] as does the Inspector General's conclusion, with the benefit of hindsight, that the decision to merge the lists was "supportable, given the desire not to release any alien who might be connected to the attacks or terrorism." *OIG Report* 71.

b. For similar reasons, petitioners are entitled to qualified immunity on respondents' equal-protection claim. As with the substantive-due-process claim, the court of appeals' inference of unconstitutional purpose was based on its determination that "there was no legitimate reason to detain [respondents] in the challenged conditions," when "the DOJ Defendants knew that the government lacked information tying [respondents] to terrorist activity, but decided to merge

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[11] See *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *al-Kidd*, 563 U.S. at 743 (citing eight-judge dissent from denial of rehearing in finding that former Attorney General Ashcroft "deserve[d] qualified immunity" for an alleged policy about detention of terrorism suspects).

the lists anyway." App. 65a-66a. But, as discussed above, that determination was not divorced from security concerns. Thus, "no clearly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance." App. 157a-158a (Raggi, J., dissenting in relevant part).

c. The absence of a clear deprivation of the equal protection of the laws prevents conspiracy liability under 42 U.S.C. 1985(3) from being clearly established. See App. 158a n.46 (Raggi, J., dissenting in relevant part). But the court of appeals further erred in rejecting a separate reason—independent of the merits of the underlying equal-protection allegations—that any violation of Section 1985(3) was not clearly established due to other uncertainties about the statute's scope. On this point, the court simply adopted the reasoning of its prior decision in *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd on other grounds, 556 U.S. 662 (2009). See App. 83a-84a. That reasoning was fatally flawed.

Hasty conceded that "it was not clearly established in 2001" that Section 1985(3) even "applied to federal officials." 490 F.3d at 176. The *Hasty* court found that uncertainty irrelevant to its qualified-immunity analysis because it believed that, as long as there was *some* right to equal protection of the laws, it did not matter whether the "*source*" of such a right was the Constitution or the statute. *Id.* at 177 (citation omitted). That rationale cannot be squared with this Court's cases, which recognize that qualified immunity applies unless the defendant's alleged actions clearly violated *the specific right* that provides the basis for the plaintiff's claim. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials sued for violations of rights

conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation."); *ibid.* ("Neither federal nor state officials lose their immunity by violating the clear command of a statute * * * unless that statute * * * provides the basis for the cause of action sued upon."); see also *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (to defeat immunity, "the clearly established right" must be "the federal right on which the claim for relief is based"). Accordingly, whether or not respondents have articulated a clearly established equal-protection claim for purposes of *Bivens*, they certainly have not done so for purposes of their statutory claim.

3. The six dissenters correctly concluded that the court of appeals' "denial of qualified immunity in the unprecedented circumstances of this case" warrants further review. App. 247a. As it has done in so many other recent cases where any constitutional violation had not been clearly established at the time of the underlying conduct, this Court should correct the court of appeals' misapplication of qualified-immunity doctrine.[12] More than 14 years after this case began, the Court should confirm that the former Attorney General and former FBI Director are entitled to qualified immunity. See *Iqbal*, 556 U.S. at 685 (noting that "[t]he basic thrust of the qualified-immunity doctrine

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[12] See, *e.g.*, *Mullenix*, 136 S. Ct. at 308-312; *Taylor* v. *Barkes*, 135 S. Ct. 2042, 2044-2045 (2015) (per curiam); *City & County of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1775-1778 (2015); *Carroll* v. *Carman*, 135 S. Ct. 348, 350-352 (2014) (per curiam); *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2022-2024 (2014); *Wood* v. *Moss*, 134 S. Ct. 2056, 2066-2070 (2014); *Stanton* v. *Sims*, 134 S. Ct. 3, 5-7 (2013) (per curiam); *Reichle*, 132 S. Ct. at 2093-2097; *al-Kidd*, 563 U.S. at 741-744.

is to free officials from the concerns of litigation, including avoidance of disruptive discovery") (citation and internal quotation marks omitted).

C. Respondents Have Not Plausibly Alleged That Petitioners Personally Condoned The Implementation Of Facially Constitutional Policies In A Discriminatory Or Unreasonably Harsh Manner

Finally, as the six dissenters concluded (App. 248a-249a) and as Judge Raggi explained at greater length (App. 123a-137a, 149a-157a), the court of appeals did not faithfully apply the pleading standard required by this Court's decision in *Iqbal*. That error, too, warrants further review.

1. Respondents' complaint alleges that Attorney General Ashcroft intended all along for the September 11 investigation to "target[] innocent Muslims and Arabs" and that Director Mueller "knowingly joined" "the Ashcroft sweeps" and "the hold-until-cleared policy." App. 265a (Compl. ¶ 41) (capitalization altered). In their view, only "invidious animus against Arabs and Muslims" would explain the policies under which respondents were detained. App. 272a (Compl. ¶ 60). In *Iqbal*, however, this Court held that similar allegations about the discriminatory purpose of the hold-until-cleared policy and the FBI's arrests were implausible in light of "more likely explanations." 556 U.S. at 681. The "'obvious alternative explanation'" was that the arrests "were likely lawful and justified by [a] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007)). Moreover, the Court concluded that the policy of imposing restrictive conditions of

confinement on September 11 detainees "plausibly suggests" only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

Perhaps because of *Iqbal*, the court of appeals eschewed respondents' theory of liability. It recognized that Ashcroft's "arrest and detention mandate" was facially legitimate and that "the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner." App. 31a. Nevertheless, the court constructed its own theory about how—in light of the ways in which the massive September 11 investigation developed—Ashcroft and Mueller could be deemed to be "responsible for a decision to merge" two lists of detainees and therefore to have "condoned" discriminatory (or unreasonably harsh) treatment of some September 11 detainees. App. 32a-33a, 61a; see App. 32a n.21 (acknowledging that respondents "did not advance the 'lists-merger theory'" in the court of appeals or district court). The court's theory depended on a series of premises: (1) that petitioners made or approved the decision to merge the lists; (2) that they did so after learning that the New York List included some persons who had been detained in connection with the September 11 investigation in part because of their ethnicity or religion but without a determination that there was reason to suspect them of links to terrorism; (3) that they also knew that some (but not most) of the detainees on the New York List were being detained in the ADMAX SHU; and (4) that they further knew that conditions of confinement in the ADMAX SHU were so restrictive that they could not

reasonably be imposed on someone for whom the government lacked individualized suspicion of terrorism connections. App. 31a-48a, 61a-68a. In light of those premises, the court concluded that respondents "have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New York List with the INS List." App. 67a; see also App. 32a-33a (describing similar chain for imputing "punitive intent" to DOJ Defendants for substantive-due-process claim); App. 81a (Section 1985(3) conspiracy claim).

2. The court of appeals' lists-merger theory depends on unsupported speculation at so many steps that it cannot overcome the "obvious" and nondiscriminatory "alternative explanation" that this Court identified in *Iqbal*. 556 U.S. at 682 (citation omitted).

As Judge Raggi explains in her dissent, even after the Inspector General's report, nothing but "pure speculation" (App. 129a) links the Attorney General or the FBI Director to the actual decision to merge the two lists of detainees. App. 124a-129a. Even assuming that petitioners made (or learned about) the lists-merger decision, that would not mean they "intended for [respondents] to be held in the MDC's ADMAX SHU"—especially when the majority of detainees on the New York List were confined in far-less-restrictive conditions at the Passaic County Jail. App. 130a, 152a-153a. Nor is it likely (as opposed to merely possible) that petitioners were made aware of the conditions of confinement at the MDC, App. 132a-135a, or that the regular arrest reports they received would have indicated that some individuals were being detained without any evidence of a potential connection to terrorism despite an INS field order that "discouraged arrest in

cases that were 'clearly of no interest in furthering the investigation,'" App. 17a (majority opinion) (quoting *OIG Report* 45).

Most importantly, even if petitioners could plausibly be thought to have known about the over-inclusiveness of the New York List *and* about the nature of the conditions of confinement at the MDC, that would still not make it likely that the decision to merge the lists was made *because of*, rather than in spite of, the allegedly discriminatory conduct underlying some of the original arrests. The obvious alternative explanation for the merger decision is far simpler: "concern that absent further investigation, 'the FBI could unwittingly permit a dangerous individual to leave the United States,'" App. 19a (quoting *OIG Report* 53)—in other words, the same rationale that this Court has previously concluded was the most likely explanation for the hold-until-cleared policy, see *Iqbal*, 556 U.S. at 683.

3. The court of appeals' chain of speculation and inference is especially troubling here because it operates as an end-run around the limits on supervisory liability. As *Iqbal* explained, an official may be liable under *Bivens* only for "his or her own misconduct." 556 U.S. at 677. Accordingly, "a supervisor's mere knowledge of his subordinate's discriminatory purpose" does not "amount[] to the supervisor's violating the Constitution." *Ibid.* Yet that is effectively what the court of appeals has made the basis of this lawsuit. See, *e.g.*, App. 67a ("[Respondents] have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New York List with the INS List.").

Allowing this damages suit against the former Attorney General and FBI Director to proceed on such terms comes at a substantial cost—one that courts should be especially reluctant to impose in the context of the unprecedented investigation into the September 11 attacks. In such situations, national officeholders should not be "deterred from full use of their legal authority" (*al-Kidd*, 563 U.S. at 747 (Kennedy, J., concurring)) by the prospect of more than a decade of litigation. The decision below warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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